Supreme Court, U.S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1424

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHAMBER OF COMMERCE OF THE UNITED STATES,
PETITIONER

v.

LEGAL AID SOCIETY OF ALAMEDA COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys

CARIN ANN CLAUS
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	12
Conclusion	22

CITATIONS

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136	17
AFL-CIO v. *Kahn*, 79-1564 (D.C. Cir. 1979), cert. denied, No. 78-1922 (July 2, 1979)	19, 20
Aune v. *Reynders*, 344 F.2d 835	12
Contractors Ass'n of Eastern Pennsylvania v. *Secretary of Labor*, 442 F.2d 159, cert. denied, 404 U.S. 854	19
Hazelwood School District v. *United States*, 433 U.S. 299	14, 16
Legal Aid Society of Alameda Co., et al. v. *John Dunlop, et al.*, Nos. 75-1870 and 75-2858 (9th Cir. April 10, 1980)	7
Lewis v. *Tobacco Wkrs. Intern. Union*, 577 F.2d 1135, cert. denied, 439 U.S. 1089	12
Maher v. *Roe*, 432 U.S. 464	20
Merritt-Chapman & Scott Corp. v. *City of Seattle*, 281 F.2d 896	12
Myers v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41	21

Cases—Continued

	Page
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	20
Poe v. *Ullman*, 367 U.S. 497	17
St. Regis Paper Co. v. *Marshall*, 591 F.2d 612, cert. denied, No. 78-1642 (Oct. 1, 1979)	21
Steward Machine Co. v. *Davis*, 301 U.S. 548	20
Sumida v. *Yumen*, 409 F.2d 654, cert. denied, 405 U.S. 964	12
Teamsters v. *United States*, 431 U.S. 324	14
United Public Workers v. *Mitchell*, 330 U.S. 75	11, 17
United States v. *New Orleans Public Services, Inc.*, 553 F.2d 459, vacated and remanded on other grounds, 436 U.S. 942	19
United Steelworkers of America v. *Weber*, 443 U.S. 193	20
University of California Regents v. *Bakke*, 438 U.S. 265	20

Constitution, statutes and regulations:

	Page
United States Constitution, Fifth Amendment	2,10, 13
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:	
5 U.S.C. 704	21
5 U.S.C. 706(1)	8
5 U.S.C. 706(2)	8
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*	2, 10
42 U.S.C. 2000e-5	21

Constitution, statutes and regulations—Continued

	Page
28 U.S.C. 1254(1)	2
28 U.S.C. 1331	8
28 U.S.C. 1361	8
41 C.F.R. Part 60, Subpart B	5
41 C.F.R. 60-1.24(c)(4)	21
41 C.F.R. 60-1.40(c)	8
41 C.F.R. 60-2	3
41 C.F.R. 60-2.1	4, 15
41 C.F.R. 60-2.2(c)	4
41 C.F.R. 60-2.10	4
41 C.F.R. 60-2.11	9
41 C.F.R. 60.2-11(b)	10
41 C.F.R. 60-2.11(b)(1)	3, 13
41 C.F.R. 60-2.11(b)(2)	3, 13
41 C.F.R. 60-2.12	9, 13, 14
41 C.F.R. 60-2.12(e)	14
41 C.F.R. 60-2.12(g)	4
41 C.F.R. 60-2.13	9
41 C.F.R. 60-2.14	4, 9, 10, 14, 15

Miscellaneous:

	Page
110 Cong. Rec. 7215 (1964)	19
117 Cong. Reg. (1971):	
p. 31903	20
p. 31925	20
118 Cong. Rec. (1972):	19
p. 1385	19
p. 1389	19
p. 1397	19
p. 1662	19
p. 1664	20

Miscellaneous—Continued Page

p. 1671 20
p. 3367 19
p. 4917 19
p. 4918 20

Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.): 2, 5, 12

Section 201 5
Section 202 2
Section 205 5
Section 209 4
Section 209(b) 5

Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978) 5
Fed. R. App. P. 41(b 12

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1424

CHAMBER OF COMMERCE OF THE UNITED STATES, PETITIONER

v.

LEGAL AID SOCIETY OF ALAMEDA COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PARTIES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-41) is reported at 608 F.2d 1319. The opinion of the district court (Pet. App. A-42 to A-69) is reported at 381 F. Supp. 125.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1979. The petition for a writ of

certiorari was filed on March 3, 1980, and a reprinted petition was filed on March 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's argument that preferential hiring by government contractors on the basis of race or sex in an effort to comply with Executive Order 11246 would violate Title VII of the Civil Rights Act of 1964 and the Fifth Amendment should be considered by the Court, even though the court of appeals expressly did not impose any preferential hiring requirement on contractors and there is no evidence in the record that any federal contractor is hiring preferentially or that any federal agency is requiring a contractor to do so to comply with the Executive Order.

STATEMENT

1. Executive Order 11246 (3 C.F.R. 339 (1964-1965 Comp.)) is designed to ensure that federal contractors' employment practices treat minorities and women fairly. Section 202 of the Order requires, as a precondition to the award of a contract, that a federal contractor agree (a) not to discriminate against any employee or applicant on the basis of race, color, religion, sex, or national origin, and (b) to take affirmative action to ensure that applicants and employees are treated without regard to their race, color, religion, sex, or national origin (Pet. App. A-74). The Department of Labor has issued

regulations establishing the requirements for acceptable affirmative action plans (41 C.F.R. Part 60-2).

The affirmative action regulations require contractors to compare the ratio of women and minority employees in each job category with the ratio of women and minorities in the contractor's relevant labor market (including, where appropriate, promotable employees already within its work force). In determining the latter ratio, a contractor must consider at least eight factors, five of which focus on the skills or potential skills of persons in the labor market.[1] This focus prevents the ratio of women and

[1] The eight factors are (41 C.F.R. 60-2.11(b)(1)):

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

The required analysis for female utilization is largely similar. 41 C.F.R. 60-2.11(b)(2). Categories (iv) through (viii) are keyed to establishing the ratio of available minority and female job candidates who are now qualified, or who could be trained to be qualified, for each of the contractor's job groups.

minorities in the pool of available individuals from being distorted through the inclusion of persons who are not qualified for the particular job or could not be expected to be qualified with training that could reasonably be expected of the contractor. If the ratio of minority or female employees is less than the ratio of available qualified minorities or females in the contractor's labor market, the contractor is required to establish a good faith goal for the level of employment of minorities and women. 41 C.F.R. 60-2.12(g). Interim goals are to be provided, but the ultimate goal must be at least equal to the availability of qualified minorities or females in the job market (Pet. App. A-36).

The regulations do not require that sanctions be imposed whenever a contractor fails to attain the goal it has established. The regulations only bind the contractor to make a good faith effort to achieve that goal, and such an effort is sufficient to ensure compliance with the Executive Order. See 41 C.F.R. 60-2.1, 60-2.2(c), 60-2.10, 60-2.14.

Section 209 of the Executive Order identifies some of the sanctions that may be imposed against a contractor that does not comply with the contractual nondiscrimination and affirmative action provisions and with the related features of the Order and implementing regulations. Under this Section, the Secretary of Labor may publish the names of non-complying contractors, recommend the institution of judicial proceedings to enforce the contractual provisions, recommend that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964,

cancel or terminate a contract, or debar a contractor from obtaining future contracts until compliance with the Executive Order is assured. Implementing regulations provide for periodic compliance reviews to be conducted by the Department of Labor and for the receipt and administrative processing of complaints filed by individuals alleging discrimination prohibited by the Executive Order. 41 C.F.R. Part 60, Subpart B. But Section 209(b) of the Order emphasizes that reasonable efforts should be made to secure compliance by methods of conference, conciliation, mediation, and persuasion before judicial proceedings are brought or a contract is cancelled or terminated.

2. This suit was filed on February 22, 1973, by individual plaintiffs and the Legal Aid Society of Alameda County against officials of the Department of Labor and the Department of Agriculture responsible for administering Executive Order 11246,[2] alleging that they had failed to administer the Executive Order properly with respect to certain federal contractors in the food processing industry in Alameda

---

[2] When this suit was filed, compliance responsibility under the Executive Order was divided among a number of federal agencies, including the Department of Agriculture. Executive Order 11246, Section 205. The Secretary of Labor was given authority to oversee the contracting agencies' administration of the Order and to promulgate necessary rules and regulations. Section 201. On October 5, 1978, the President issued Executive Order 12086 (43 Fed. Reg. 46501), which gives the Department of Labor complete responsibility for enforcing the Executive Order and removes enforcement authority from other contracting agencies.

County, California. The complaint alleged, *inter alia*, that USDA had approved contractors' affirmative action plans that did not satisfy the Department of Labor's regulations governing the content of such plans.

On November 15, 1973, plaintiffs filed a motion for partial summary judgment,[3] which the court granted on June 20, 1974 (Pet. App. A-42 to A-69). The district court found that USDA had approved affirmative action plans that did not contain all the provisions required by the Labor Department regulations (Pet. App. A-56 to A-68). The court ordered USDA officials to approve only programs containing all provisions required by federal regulations (Pet. App. A-70 to A-72) and to rescind approval of 10 specific affirmative action programs the court examined and found deficient (Pet. App. A-72 to A-73).

Several federal contractors and petitioner Chamber of Commerce then moved to intervene for the purpose of reopening the proceedings (Pet. App. A-6). The district court denied the motion to intervene generally, but permitted the movants to intervene for purposes of taking an appeal (Pet. App. A-6). Petitioner and the contractors filed the appeal, which

[3] The complaint also alleged that the responsible officials failed even to review many contractors' affirmative action programs before approving contracts. Plaintiffs did not seek summary judgment on that issue, and it is not presented in the petition for a writ of certiorari.

was argued in October 1976.[4] The federal officials did not appeal from the grant of summary judgment.

3. On December 4, 1979, the court of appeals affirmed that portion of the district court's order prohibiting USDA officials from approving affirmative action plans unless they contained all the provisions required by Department of Labor regulations. The court declared moot that portion of the district court's

[4] The contractors also appealed the district court's order denying their motion to intervene. The court of appeals held that their presence on appeal rendered harmless any error in failing to join them as parties in the district court, because their objections to the district court's interpretation of the Executive Order raised strictly legal issues subject to full review in the court of appeals (Pet. App. A-9 to A-10). Petitioner did not appeal the district court's order denying its initial motion to intervene for purposes other than appeal (Pet. App. A-10 n.13), and the intervention question is not presented in the petition for a writ of certiorari.

After the June 1974 order granting partial summary judgment in favor of plaintiffs, the litigation in the district court expanded to cover contracts entered into by the General Services Administration. Petitioner Chamber of Commerce was permitted to intervene for the limited purpose of opposing certain discovery motions in that portion of the case. Petitioner filed a motion to intervene generally in the GSA portion of the suit on May 30, 1975, but this motion was denied by the district court. Following its decision on the issues on which petitioner now seeks review in this Court, the court of appeals reversed and remanded the district court's order denying petitioner's motion to intervene in the GSA portion of the litigation. *Legal Aid Society of Alameda Co., et al.* v. *John Dunlop, et al.*, Nos. 75-1870 and 75-2858 (9th Cir. April 10, 1980).

order directing the federal officials to rescind their approval of specific affirmative actions plans.[5]

a. The court recognized (Pet. App. A-15) that under the regulations, agencies are invested with some discretion in determining whether a contractor's performance is in compliance with the Executive Order, because a good faith effort to make the affirmative action program work is the measure of compliance (*ibid.*, citing 41 C.F.R. 60-2.14). But the court held that an agency has no discretion in the first instance to accept a plan that omits items required by the regulations implementing the Executive Order (Pet. App. A-13 to A-16).

Accordingly, the court reviewed a number of affirmative action plans USDA had accepted and agreed with the district court that the plans did not contain several important features required by regulation (Pet. App. A-29 to A-31). For example, all of the plans failed to consider all of the factors specified in the regulations for determining the availability of minorities and women for the contractor's job categories (see 41 C.F.R. 60-2.11). Many also failed to establish goals and timetables as required (see 41 C.F.R. 60-2.12), or to establish a plan to recruit minorities and women, to indicate support for community-based programs to improve employment opportunities for minorities and women, or to develop internal audit and reporting systems for measuring the effectiveness of the plan (see 41 C.F.R. 60-2.13). The court of appeals therefore affirmed the district court's order directing USDA to approve affirmative action plans only if they conformed to Department of Labor regulations containing these and other requirements.

[5] The court noted that the regulations require that affirmative action plans be reviewed and updated annually (see 41 C.F.R. 60-1.40(c)) and that as a result of this process, the plans the district court had invalidated had been replaced by new plans.

The court also affirmed the district court's procedural and jurisdictional rulings, and petitioner does not question these rulings in its petition. The court of appeals held that private plaintiffs can bring an action, either under the Administrative Procedure Act (5 U.S.C. 706(1) and (2), and, presumably, 28 U.S.C. 1331) or in the nature of mandamus (28 U.S.C. 1361), to compel government officials to perform the nondiscretionary acts the Executive Order and implementing regulations require (Pet. App. A-15 to A-17; see also Pet. App. A-52 to A-53). The court also held that the plaintiffs had standing to challenge the government's actions under the Executive Order (Pet. App. A-18 to A-25). Finally, the court held that plaintiffs were not required to exhaust administrative remedies because administrative remedies were available under applicable regulations only to correct alleged discrimination by individual contractors, not to challenge an agency's failure to enforce the Order (Pet. App. A-25 to A-29). In any event, the court noted that the plaintiffs had submitted their grievance to USDA, both before they filed this action and after the district court stayed proceedings to permit administrative disposition of the issues (*id.* at A-27 to A-28).

Because the federal officials acquiesced in the judgment of the district court on the merits, this case no longer presents any live controversy about the standing of the original plaintiffs to bring an action to compel them to do so, exhaustion of administrative remedies, or the relief available under the Administrative Procedure Act or 28 U.S.C. 1361 to compel government officials to perform duties under an Executive Order of the President under circumstances such as those presented here.

b. The court rejected petitioner's argument that the district court's order had the effect of establishing rigid compliance standards and eliminated the agencies' ability to exercise discretion in administering the Executive Order. The court stressed that flexibility remains an inherent part of the process of establishing both the relevant labor market and the availability of qualified females and minorities within that market (Pet. App. A-36 to A-37). The court stressed as well that a contractor's own goal, once set, does not become an inflexible requirement which must be met in all circumstances. "Compliance is measured by good faith efforts to attain [the goals], not by whether they are realized" (Pet. App. A-38 to A-39, citing 41 C.F.R. 2.14).

c. The court of appeals also rejected petitioner's argument that the district court's decree violates Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.*, and the Fifth Amendment by requiring a contractor to hire personnel based on their race or sex, rather than their qualifications. The court of appeals concluded that neither the decree nor the federal regulations it sought to enforce require preferential hiring. A hiring goal, in the courts view, reflects only the contractor's own assessment of the availability of qualified females and minorities within its hiring area (Pet. App. A-39; see 41 C.F.R. 61-2.11(b)). Thus, the court reasoned, practices that are neutral with respect to race and sex should result in hiring ratios approximately equal to the per-

centage of qualified minority or female applicants (Pet. App. A-40). The court continued (*ibid.*):

> Given this premise, it is entirely reasonable to assume that a contractor who finds a lower percentage of women or minority members in a particular job category in his work force may well be able to correct the deficiency simply by removing obstacles to fair and equal employment, without reliance upon racial preference or discrimination.

The court recognized it is conceivable that a particular contractor might attempt "expediently" to utilize preferences on the basis of race or sex in order to meet a goal, or that an agency might suggest that preferences be adopted (Pet. App. A-41). But the court held that in the event such practices occur, "[b]oth administrative and judicial remedies will be available to test the lawfulness of such provisions on the basis of a specific record" (Pet. App. A-41). The court held, therefore, that the possibility that a particular contractor might engage in preferential hiring was merely "hypothetical" and was "not a sufficient ground for condemning the [affirmative action] requirement on its face" (*ibid.*, citing *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947)).[6]

---

[6] Respondent Legal Aid Society suggests (Br. 3) that this case is moot because it was dismissed by the district court on February 28, 1980. The dismissal order was the result of a settlement negotiated by attorneys for the government and attorneys for the plaintiffs.

The court of appeals' opinion that is the basis of the instant petition for a writ of certiorari was entered on December 5,

ARGUMENT

Petitioner suggests that this case presents an opportunity for the Court to consider whether the federal government, through Executive Order 11246, may require federal contractors to hire on the basis of race or sex. But, contrary to petitioner's assertion, the judgment of the court of appeals expressly does *not* require preferential hiring. There is, moreover, nothing in the record in this case to indicate that any contractors are hiring preferentially—much less what the circumstances of any such hiring might be—or that any federal agency is threatening contractors with sanctions unless they hire preferentially. Accordingly, even if the preferential hiring issues petitioner raises appear worthy of review, this case clearly does not present the appropriate occasion for considering them. Only in the context of a concrete case, reflecting the experience of the particular contractor, labor market, and industry, should the Court consider the interplay of the affirmative action requirements of Executive Order 11246 and Title VII and the Fifth Amendment.

1979. On January 22, 1980, the court of appeals stayed its mandate pending filing of the certiorari petition by March 14. Petitioner filed its petition on March 3, effectively extending the stay of the mandate. Fed. R. App. P. 41(b). It is well established that once an appeal is filed, jurisdiction passes from the district court to the court of appeals, and is returned only after the appellate court issues the mandate. *Lewis* v. *Tobacco Wkrs. Int'l Union*, 577 F.2d 1135, 1139 (4th Cir. 1978), cert. denied, 439 U.S. 1089 (1979); *Aune* v. *Reynders*, 344 F.2d 835 (10th Cir. 1965); *Sumida* v. *Yumen*, 409 F.2d 654, 656-657 (9th Cir. 1969), cert. denied, 405 U.S. 964 (1972); *Merritt-Chapman & Scott Corp.* v. *City of Seattle*, 281 F.2d 896, 898-899 (9th Cir. 1960). The district court therefore did not have jurisdiction on February 28 to dismiss that portion of the case that was on appeal.

1. Petitioner contends (Pet. 7, 12-13, 14, 16) that the district court's order requires a contractor to establish and adhere to fixed "quotas" for the hiring of minorities and women. This is an obviously incorrect reading of the order and decisions below.

The district court's order, although directed to responsible government officials, does have the effect of requiring contractors in Alameda County to include in their affirmative action plans goals and timetables for hiring or promoting minorities and women as a condition to having those plans approved under the Executive Order (Pet. App. A-72 to A-73). But this is nothing more than what the regulations implementing the Executive Order have long required (41 C.F.R. 60-2.12). Petitioner plainly errs in stating (Pet. 7) that "a federal contractor must reach this established percentage or remain noncompliant."[7] Nothing in the decisions below or gov-

[7] Petitioner also errs in stating (Pet. 8, 14) that the decisions below require adherence to an "arbitrary percentage" of minority workers based on their representation in the general population labor market, irrespective of skills. Five of the eight factors to be considered by a contractor under the regulations in determining whether there is a disparity in its employment of minorities and women require the contractor to focus on existing or reasonably attainable skills of potential minority or female employees (see 41 C.F.R. 60-2.11 (b) (1) and (2); note 1, *supra*). The district court's order was fashioned to enforce the requirements of the regulations (Pet.

erning regulations suggests that a contractor is "non-compliant" unless and until he *reaches* certain percentage goals. To the contrary, both make clear that a contractor is in full compliance with the affirmative action requirement at the outset if the plan it initially submits contains appropriate goals and timetables and that the contractor remains in compliance if it thereafter makes a good faith effort to meet them (Pet. App. A-38 to A-39, A-72 to A-73; 41 C.F.R. 60-2.12 and 60-2.14). The regulations, which the decisions below do not affect, expressly prohibit treating a contractor's goals as "rigid and inflexible quotas which must be met" (41 C.F.R. 60-2.12(e)) and provide that "[n]o contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables" (41 C.F.R. 60-2.14):

> Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward the

App. A-6, A-29 to A-30, A-57 to A-58, A-70), and neither that order nor the court of appeals' decision affirming it requires that availability be measured by the percentage of minority or female workers in the labor market generally, without regard to their skills or qualifications (see Pet. App. A-36 to A-37, A-38 to A-39). Petitioner therefore errs in relying (Pet. 14) on statements in *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977), and *Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977), about the probative value of comparisons to the general population rather than to those who possess any special skills necessary for the job.

> realization of the program's goals within the timetables set for completion.

(*Ibid.*).[8]

2. Petitioner erroneously characterizes the decisions below as requiring federal contractors to insert preferences on the basis of race or sex into their hiring practices (Pet. 8-10, 15). The Executive Order does require every contractor to adopt and follow an affirmative action plan. 41 C.F.R. 60-2.1; Pet. App. A-77. However, the regulations governing the formulation and enforcement of affirmative action plans do not require preferential hiring as part of a plan, and the decisions below do not affect or alter those regulations.

As the court of appeals observed (Pet. App. A-40), hiring practices that are nondiscriminatory could be expected, over time, to result in a composition of an employer's work force approximately equal to that

[8] The court of appeals' opinion itself refutes petitioner's further contention that the opinion limited the contractors' good faith flexibility "only to the establishment of the goal *not* to its achievement" (Pet. 7; emphasis in original). The court of appeals' opinion expressly states (Pet. App. A-38) that "[c]ompliance is measured by good faith efforts to attain [goals], not by whether they are realized." The opinion cites for this proposition 41 C.F.R. 60-2.14 (quoted in the text), which petitioner cites with approval (Pet. 11 n.6) for the proposition that regulations implementing the Executive Order "provide essential discretionary flexibility * * * rather than risking the forfeiture of all positive influence which might result from an arbitrary or rigid compliance standard." We agree with this characterization of the administrative enforcement scheme, and so did the court of appeals.

of the portion of the population at large having the requisite qualifications. See also *Hazelwood School District* v. *United States*, *supra*, 433 U.S. at 307, quoting *Teamsters* v. *United States*, *supra*, 431 U.S. at 340 n.20. Given this premise, as the court of appeals pointed out (Pet. App. A-40), it is entirely reasonable to assume that a contractor will be able to satisfy the goals it has established in its affirmative action plan "simply by removing obstacles to fair and equal employment, without reliance upon racial preference or discrimination." Thus, if minority or female individuals do not apply in the numbers that might otherwise reasonably be expected, the contractor might make special efforts to inform these potential applicants of available jobs, endeavor to correct any negative image it might have, or encourage unions or others who refer applicants to eliminate discriminatory practices. If, on the other hand, the contractor attracts a reasonable number of minority and female applicants, but hires a low percentage of them, the contractor might reexamine its testing and screening procedures to ensure that they do not bring about or mask discriminatory hiring decisions (Pet. App. A-40 to A-41).

None of these measures designed to remove obstacles to equal employment opportunity could be said to grant a "preference" to minority or female applicants, and these measures will in many instances result in a contractor's satisfying fully the goals and timetables it has set in its affirmative action plan

based on the projected availability of qualified women and minorities. Moreover, a contractor that falls short of its goals will be found to be in compliance with the Executive Order if it takes these or other steps under the affirmative action plan in good faith. For these reasons, the court of appeals was correct in stating (Pet. App. A-39) that "[n]othing in the decree or inherent in the circumstances of this case requires preferential treatment or discrimination on the basis of race or sex."

Nor is there any evidence in the record that any employer is engaging in preferential hiring in reliance on the decisions below or that any federal agency is directing that such a practice be followed. The possibility that a contractor might engage in preferential hiring in the future is speculative at best, and the legality of any such practice could not, in any event, be adjudicated in the abstract without focusing on the circumstances of the particular employer, industry, and job market. It would be premature to attempt to resolve these issues in the abstract on the basis of nothing more than the bare and dated record in this case. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967); *Poe* v. *Ullman*, 367 U.S. 497 (1961); *United Public Workers* v. *Mitchell*, *supra*, 330 U.S. at 90.

3. Petitioner argues (Pet. 9, 10, 15) that Congress, in enacting Title VII in 1964 and amending it in 1972, intended in some manner to circumscribe the President's authority to require affirmative

action in hiring by government contractors under Executive Order 11246. The specific contention appears to be that Congress did not intend to allow the President to retain any authority to require that government contractors adopt hiring quotas or other preferences for minorities or women in employment absent a finding of prior discrimination, and that the decisions below are therefore in error because they impose such quotas or preferences without a finding that the food processing industry involved in this case had practiced industry-wide discrimination (see Pet. 11-12). This argument has no relevance here, however, because the decisions below, as we have explained, do not require government contractors to adopt rigid hiring quotas or preferences for minorities and women.

We do not understand petitioner to argue that Title VII prohibits the President from requiring a company that wishes to do business with the government to adopt an affirmative action plan without a finding of prior discrimination if the plan does *not* involve fixed quotas or preferences. Indeed, petitioner appears to concede the validity of the Executive Order itself (Pet. 9) and the soundness of the implementing regulations concerning the establishment of minority hiring goals in an affirmative action plan and the administrative determination of compliance status based on good faith efforts to meet those goals (Pet. 10-11 n.6), provisions that do not depend on any finding of prior discrimination. Petitioner merely argues—erroneously—that the decisions below depart from the flexible approach in the regulations.

In any event, the language and legislative history of Title VII, both as originally enacted in 1964 and as amended in 1972, refute petitioner's contention that Congress intended to circumscribe the President's authority to advance equal employment opportunity by government contractors. To the contrary, as the court of appeals recognized (Pet. App. A-11 to A-12 n.14), the language and legislative history of Title VII demonstrate that Congress approved of the Executive Order program. See, *e.g.*, *AFL-CIO* v. *Kahn*, No. 79-1564 (D.C. Cir. 1979) (en banc), slip op. 13 n.33, cert. denied, No. 78-1922 (July 2, 1979); *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459, 467 (5th Cir. 1977), vacated and remanded on other grounds, 436 U.S. 942 (1978); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 171 (3d Cir.), cert. denied, 404 U.S. 854 (1971).[9]

---

[9] When Title VII was enacted, Congress disclaimed any intent to affect the existing Executive Order program. See 110 Cong. Rec. 7215 (1964) (memorandum of Sen. Clark and Sen. Case). When Congress amended Title VII in 1972, it was well aware of the Executive Order's requirements that contractors adopt goals regardless of a prior finding of discrimination. See 118 Cong. Rec. 1385, 1389, 1397 (1972). Congress defeated several amendments designed to curb enforcement of the Executive Order program. See 118 Con. Rec. 1662, 3367, 4917 (1972). In addition, Congress repeatedly referred to the decision in *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra*, which specific-

4. There are, moreover, a number of administrative and judicial remedies available to a contractor, employee, or applicant who believes that unlawful "quotas" or "preferential hiring" have been required, and there is no reason why those established avenues should be bypassed here. The contractor could raise issues of supposed preferential hiring in the course of the conciliation the Executive Order contemplates. The contractor could press this argument further in the more formal administrative or judicial proceedings brought under the Executive Order to enforce the contract terms, to cancel or suspend a contract, or to debar the contractor.[10] Employees or

---

ally upheld a requirement under the Executive Order that a contractor adopt a goal without regard to its own past practices. See 442 F.2d at 176. Repeated references in the legislative history to the *Contractors Ass'n* case (see 117 Cong. Rec. 31903, 31925 (1971), 118 Cong. Rec. 1664, 1671, 4918 (1972)) refute petitioner's argument that Title VII prohibits enforcement of the Executive Order. See also *University of California Regents* v. *Bakke*, 438 U.S. 265, 354 n.28 (1978) (opinion of Brennan, White, Marshall, and Blackmun, J.J.).

Moreover, a bona fide affirmative action plan adopted by an employer in order to obtain a government contract would appear to be a voluntary plan (see *AFL-CIO* v. *Kahn*, *supra*, slip op. 19-21; see also *Maher* v. *Roe*, 432 U.S. 464, 476 (1977); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589, 591 (1937)) which, if reasonable, would be permissible under Title VII without regard to the specific indicia of congressional approval of the Executive Order program. See *United Steelworkers* v. *Weber*, 443 U.S. 193, 203-207 (1979).

[10] Indeed, the contractor always has the option of complying with a government directive under protest, and thereby obtaining an administrative hearing without any risk of loss

applicants who believe a contractor has engaged in "preferential" hiring could file a complaint with the Secretary alleging that such hiring violates the nondiscrimination clause of the contract or the Executive Order and implementing regulations. Satisfactory accommodations or resolutions might well be obtained in particular cases in this manner. No reason appears why affected contractors, employees, or applicants—or petitioner on their behalf—should be excused from the usual requirement that they exhaust the administrative remedies available to them. See *St. Regis Paper Co.* v. *Marshall*, 591 F.2d 612 (10th Cir.), cert. denied, No. 78-1642 (Oct. 1, 1979) (exhaustion required in case involving Executive Order 11246). See also *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938).

Similarly, to the extent affected employees or potential employees might contend that an employer's hiring practices under an affirmative action plan violate Title VII of the Civil Rights Act of 1964, they would be required to pursue the firmly established procedures under Title VII, including the filing of a complaint with a state agency or the Equal Employment Opportunity Commission. 42 U.S.C. 2000e-5. It would therefore be inappropriate for the Court to consider arguments based on Title VII advanced by petitioner here in the abstract, without the benefit of

---

of contracts. 41 C.F.R. 60-1.24(c)(4). Like other final administrative decisions, these are subject to judicial review. 5 U.S.C. 704.

the Commission's administrative procedures and expertise and the development of a factual record as in any other Title VII case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

BRIAN K. LANDSBERG
MARK L. GROSS
Attorneys

CARIN ANN CLAUS
Solicitor of Labor

MAY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 320492 320